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IN THE

Supreme Court of the United States

ABDELHALEEM HASAN ABDELRAZIQ ASHQAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's fact finding at sentencing, based upon a preponderance of evidence standard, which results in a sentence within the statutory maximum but not inherent in or supported by the jury verdict, and which is dramatically higher than the sentencing guidelines base offense level and unreasonably excessive without such fact finding, violates the Sixth Amendment.

2. Whether the "terrorism enhancement" guideline, U.S.S.G. § 3A1.4 and Application Note 2, which mandates an irrebuttable presumption that a defendant who refuses to testify before a grand jury investigating a federal crime of terrorism obstructs a terrorism investigation, and thus "intends to promote a federal crime of terrorism," without any consideration of the defendant's actual *mens rea*, violates the Fifth, Sixth and First Amendments.

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Petitioner Abdelhaleem Hasan Abdelraziq Ashqar ("Petitioner") respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois sentencing Petitioner is reproduced in the Appendix to this petition ("Pet. App.") at 17a-45a. The opinion of the United States Court of Appeals for the Seventh Circuit is reprinted at 582 F.3d 819 and is reproduced in the Appendix to this petition. Pet. App. 1a-16a. The order denying the petition for rehearing en banc is unpublished, but is reprinted at Pet. App. 46a-47a.

JURISDICTION

A judgment of the Court of Appeals was entered on October 2, 2009. The Court of Appeals denied Petitioner's petition for rehearing and rehearing en banc on October 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

U.S. Const. amend I.

The Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend V.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury.

U.S. Const. amend VI.

STATUTORY PROVISIONS

Section 3A1.4 of the United States Sentencing Guidelines provides:

> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

U.S.S.G. § 3A1.4.

Application Note 2 to Section 3A1.4 of the United States Sentencing Guidelines provides in relevant part:

> For purposes of this guideline, an offense that involved . . . (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

Note 2 to U.S.S.G. § 3A1.4.

Title 18, Section 401(3) of the United States Code provides in relevant part:

> A court of the United States shall have the power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401(3).

INTRODUCTION

Petitioner, a Palestinian National, with a Ph.D. in business administration from the University of Mississippi, and a former candidate for the presidency of the Palestinian Authority in 2006, was sentenced to 135 months in prison on his conviction for criminal contempt and obstruction of justice based on his refusal to testify before a federal grand jury investigating the support structure in the United States of the Palestinian

resistance organization Hamas, a designated foreign terrorist organization under U.S. law. In fashioning her sentence, the district court made a determination to impose the "terrorism enhancement" sentencing guideline using a preponderance of evidence standard. Pet. App. 36a. This judicial finding, dramatically and unreasonably increased Petitioner's sentence, which was not inherent in the jury verdict which had acquitted him on the most serious charge - RICO conspiracy - and would not have been justified but for the district court's additional fact finding.

In calculating Petitioner's sentence, the district court found that Petitioner's failure to testify before a grand jury investigating the "federal crime of terrorism" constituted an "intent" to promote the federal crime of terrorism. Pet. App. 36a. This finding increased Petitioner's base offense guideline range from 15-21 months to 210-262 months. Pet. App. 37a. The district judge then reduced Petitioner's sentence to 135 months after the court found that Petitioner had not personally engaged in violent activity, had no prior criminal history, and that the grand jury was not investigating acts of terrorism in the United States. Pet. App. 39a, 42a-43a.

The United States Court of Appeals for the Seventh Circuit affirmed Petitioner's sentence finding that since Petitioner's sentence was below the statutory maximum, the imposition of the terrorism enhancement was not in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. Pet. App. 10a-11a. "So long as the Guidelines are advisory, the maximum sentence a judge may impose is the *statutory* maximum." Pet. App. 11a (emphasis in original). The Appeals Court recognized,

however, that Petitioner's argument that in determining whether a sentence runs afoul of the Sixth Amendment, the maximum sentence that should be considered reasonable is one that would be considered reasonable based solely on the facts found by the jury. "While the argument is not without its advocates, see *Rita v. United States* 338, 369-85, 127 S. Ct. 2456, 168 L. Ed 2d 203 (2007) (Scalia J., concurring), it is not the law." Pet. App. 11a.

Petitioner's case presents the stark example of the increasing use of judicial fact-finding using a preponderance of evidence standard to unreasonably increase a defendant's sentence, which is not sanctioned by the jury's verdict, in violation of the Sixth Amendment. This case presents the precise problem which this Court left undecided in *Rita v. United States*, 551 U.S. 338 (2007), which Justice Scalia recognized in his concurring opinion was a "patent inconsistency hanging in the air, threatening in the future yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust." *Id.* at 384 (Scalia, J., concurring in part and concurring in judgment).

To restrict the limitation on judicial fact-finding at sentencing only to cases in which the statutory maximum is exceeded is unfair and unwarranted in criminal contempt convictions for grand jury resistence. Since the criminal contempt statute (18 U.S.C. § 401(3)), has no maximum penalty allowing for any sentence up to life in prison, the district court can engage in unfettered judicial fact-finding that dramatically increases a defendant's sentence and yet not arguably run afoul of

United States v. Booker, 543 U.S. 220 (2005) and its progeny.

The Appeals Court also found that the refusal to testify before a grand jury investigating a federal crime of terrorism constitutes an intent to obstruct such a terrorism investigation, and thus "promotes" the crime of terrorism mandating the imposition of the terrorism enhancement guideline. Pet. App. 13a. This interpretation of the terrorism enhancement guideline, and the accompanying Application Note 2, violated Petitioner's Fifth, Sixth and First Amendment rights since the guideline language mandates that anyone who refuses to testify before a grand jury investigating terrorism is *per se* obstructing a terrorism investigation and thus promoting the crime of terrorism. The guideline thus mandates the imposition of the terrorism enhancement to any defendant who refuses to testify before a grand jury investigating a federal crime of terrorism regardless of the actual intent of the grand jury resistor. Here, the sentencing court found that Petitioner's refusal to testify was "intended" to promote the federal crime of terrorism, without giving any consideration to the stated and uncontradicted political and religious motivations underlying his refusal.

Petitioner's 135 month sentence for refusing to testify before a grand jury was not inherent in the jury verdict and is unprecedented in its severity. The sentence unfairly punishes a defendant's conduct based solely upon the matters under investigation by the grand jury, rather than based on a finding of a defendant's own intent determined by a jury. Petitioner's challenge to the "terrorism enhancement" guideline, which

substantially increases a defendant's sentence for refusing to testify before a grand jury but obviates a *mens rea* requirement, presents a case of importance and of first impression.

STATEMENT OF THE CASE

Petitioner, Abdelhaleem Hasan Abdeelraziq Ashqar, has been an activist his entire adult life in the cause of Palestinian rights and the end to the occupation of his homeland. Born in 1958, Petitioner comes from three generations of Palestinians who vocally opposed the occupation of their land by foreign powers. Petitioner's grandfather was imprisoned for 6 years for his political views during the Turkish occupation of Palestine, and his father lost his farm unable to deliver his harvest because of Israeli travel restrictions and curfews imposed on the Palestinians.

In 1979, Petitioner became active at the Bir Zeit University in Ramallah in student organizations advocating for Palestinian rights. In 1981 Petitioner was arrested by the Israeli authorities during a student protest, held for 16 days without charges, and subjected to harsh interrogation. This was the first of several arrests and interrogations by Israeli authorities focused on trying unsuccessfully to force Petitioner to give information about his fellow student activists.

After obtaining his masters in business administration in Greece in 1985, Petitioner returned to occupied Palestine and was employed as a lecturer in the School of Economics and Management at the Islamic University of Gaza. The following year, Petitioner was

appointed as the Director of Public relations for the Islamic University in Gaza. Again Petitioner was arrested by the Israelis and the University was completely shut down by the Israeli Defense Forces.

In 1989, Petitioner won a Fulbright scholarship, and after months of the government of Israel's refusal to allow him to leave Gaza, he was finally able to leave and enter the United States to attend the University of Mississippi to obtain a Ph.D. in business administration. While a student at the University in Oxford, the FBI began looking into Petitioner's activities at the behest of the government of Israel and Petitioner agreed to voluntarily meet with the FBI. During the same period, the FBI secretly began surveillance of Petitioner's phone communication, mail faxes, and even surreptitiously entered his home and photographed hundreds of political and educational materials found there.

Although Petitioner willingly spoke with the FBI - meeting with them on over fifteen occasions - about the plight of his homeland and his views on how best to educate the people of the United States about it, he consistently refused to provide information about fellow activists. Upon learning that Petitioner, having obtained his Ph.D., intended to relocate to New Jersey, the FBI agents threatened that if he did not agree to provide information about other Palestinians he would be deported and they would spread the word that he had informed against others. Despite the threats, Petitioner steadfastly refused to become an informant.

Seven years later, in 1998, Petitioner was subpoenaed to testify before a grand jury in the Southern District of New York. Refusing to testify citing his political, religious beliefs, and his fear of persecution by the government of Israel, Petitioner was imprisoned in civil contempt. Stating that he would rather starve to death than become an informant against his people, Petitioner initiated a hunger strike and after 6 months the district judge who had sentenced him in contempt found that Petitioner was not going to be coerced to testify and ordered his release.

Upon his release from custody, Petitioner petitioned for political asylum stating that he had a well-founded fear of persecution by the Israeli authorities if he returned to his occupied homeland. However, upon learning that his petition for political asylum would require him to provide information about other Palestinian activists he withdrew the petition and agreed to voluntarily depart.

In June of 2003, just days before his scheduled voluntary departure, Petitioner was again subpoenaed before a grand jury sitting in the Northern District of Illinois. As he had stated before the New York grand jury, Petitioner, citing his political, personal, religious beliefs and his fear of persecution by Israel, again refused to testify and was again imprisoned for civil contempt:

> I respectfully refuse to answer any question put to me other than my name, address and occupation on several grounds. Most important, to do so would violate my long-held

> unshakable religious, political and personal beliefs. Second. Any answer I might provide, could and would be given to Israel and would be used by Israel against me in an unfair, illegal and politically motivated prosecution for my beliefs, and associations and religion. Third. Having been tortured by Israel for my beliefs, associations and religion any answer I might provide could be given to Israel which would again torture me as a result of such answer.

After serving several months in civil contempt, Petitioner was indicted with two others in a sweeping RICO conspiracy - spanning a period of over 20 years - as a leader of the Palestinian Islamic movement - Hamas. The RICO count charged as two of the predicate acts intended to further the illicit activities of Hamas, Petitioner's grand jury refusals in 1998 and 2003. In addition to the RICO count, Petitioner was also charged with obstruction of justice and criminal contempt for his refusal to testify before the grand jury in Chicago in 2003.

After a three month trial, the jury acquitted Petitioner of the RICO charge. In essence, the jury found that Petitioner had not been part of an agreement to further the illicit goals of Hamas or agreeing to aid and abet the illicit goals of Hamas. However, the jury convicted Petitioner of the obstruction and criminal contempt charges for his refusal to testify before the Chicago grand jury in 2003.

At sentencing, the district judge made factual findings under a preponderance standard and imposed the "terrorism enhancement" guideline, finding that the purpose of Petitioner's refusal to testify was to "promote a federal crime of terrorism," under U.S.S.G. § 3A1.4. Pet. App. 36a. Based on this determination, Petitioner's offense level was increased 18 levels to a level 32, and his criminal history to a category VI, which presented a guideline sentencing range of 210-262 months. Pet. App. 37a. Without the district court's findings, Petitioner's base offense guideline sentencing range was 15-21 months.[1]

The district court then finding that Petitioner had no prior criminal history, that there was no evidence that Petitioner "ever participated in any violent acts or intended to do so," and that there was no evidence that the "terrorist activities under investigation by the grand jury were directed at the United States," sentenced Petitioner to a prison term of 135 months.[2] Pet. App. 39a, 42a-43a.

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1. The base level for obstruction of justice under 2J1.2 is level 14. Similarly, the criminal contempt conviction, which is analogous to the obstruction in this case, *see* 2X5.1, also sets a base level of 14. The district court did find that Petitioner's refusal to testify constituted a substantial interference of the administration of justice, increasing the base offense level three points (2J1.2(b)(2)) to 17, a range of 24-30 months. Pet. App. 25a.

2. The district court determined that a category VI criminal history "significantly and substantially over represented Petitioner's criminal history." Pet. App. 39a, 42a-43a. Reducing the criminal history to a category I and maintaining an offense level of 32, the court calculated a guideline range of 121-151 months. *Id.*

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE IMPORTANT CONSTITUTIONAL ISSUE PRESENTED HERE HAS BEEN LEFT OPEN BY RECENT SUPREME COURT CASES AND NEEDS TO BE CLARIFIED.

This case presents an important and unresolved question flowing from this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*, 543 U.S. 220 (2005) and their progeny, which has been left undecided by this Court's recent opinions in *Rita v. United States*, 551 U.S. 338 (2007) and *Gall v. United States*, 552 U.S. 38 (2007). The issue presented here is whether a district court may find additional facts by a preponderance of evidence in order to calculate an initial sentencing range using the "terrorism enhancement" under the United States Sentencing Guidelines and then use that calculation to fashion a sentence which is within the statutory maximum, but substantially and dramatically higher than would be warranted by facts admitted by the defendant or inherent in the jury verdict.

This Court has held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. *See Cunningham v. California*, 559 U.S. 270, 274-275 (2007) ("the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to

impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."); *United States v. Booker*, 543 U.S. 220, 243-244 (2005); *Blakely v. Washington*, 542 U.S. 296, 303-304 (2005).

While this Court has affirmed that a sentencing court has discretion in sentencing, it has stated that a judge can exercise such discretion only so long as the sentence falls within the statutory maximum "authorized by the jury verdict." *Cunningham*, 559 U.S. at 282.

A. PETITIONER'S SENTENCE WAS NOT AUTHORIZED BY THE JURY VERDICT, NOR SHOULD CRIMINAL CONTEMPT, WHICH HAS NO STATUTORY MAXIMUM PENALTY, ALLOW THE SENTENCING COURT UNFETTERED DISCRETION IN MAKING ADDITIONAL FACTUAL FINDINGS.

While there is ambiguity in this Court's language, lower court's have interpreted a Sixth Amendment[3] constitutional limitation on a sentencing court's discretion to rely on judicially found facts to increase a defendant's sentence to apply only when the additional judicial fact-finding imposes a sentence above the otherwise statutory maximum. In this case and others, however, such an interpretation is not fair nor reasonable because the statute under which the defendant was

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3. Section 2 of Article III which provides that, "The trial of all crimes, except in cases of impeachment shall be by jury," also provides a constitutional basis for right to a jury trial.

sentenced - criminal contempt[4] - has no maximum sentence - allowing for a sentence up to life in prison. Thus, limiting the sentencing court's use of judicially found facts only to circumstances where the sentence exceeds the statutory maximum, would allow a court to rely on judicial fact-finding to increase a sentence ten fold or more, regardless of the jury verdict or what was fair and reasonable under all the circumstances.

Were it not for the sentencing court's determination to apply the "terrorism enhancement," finding that Petitioner obstructed an investigation of the federal crime of terrorism, a sentence of 135 months for obstruction or criminal contempt would not have been justified.[5] The sentencing court's finding that Petitioner's refusal to testify before a grand jury constituted an intent to obstruct an investigation of the federal crime of terrorism was not a determination of the Petitioner's offense characteristics, but clearly a determination of the Petitioner's conduct, a traditional

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4. *See* 18 U.S.C. § 401(3). While Petitioner was also sentenced for obstruction of justice (18 U.S.C. § 1503), the maximum sentence under that statute is 120 months and therefore the 135 month sentence Petitioner received was under the open-ended criminal contempt statute.

5. Without the invocation of the terrorism enhancement, the base offense guideline level for obstruction/criminal contempt is 14. Given Petitioner's absence of any criminal record his guideline sentencing range would have been between 15 and 21 months. *See* U.S.S.G. § 2J1.1 In fact the Justice Department statistics reveal that the average sentence for criminal contempt between the years 2004-2008 was less than 3 years. *See Sourcebook of Criminal Justice Statistics, http://www.albany.edu/sourcebook/tost_5.html#5_ab.*

issue to be decided by a jury and not the sentencing judge.[6] As this Court stated in *Blakely*, we "give intelligible content to the right of jury trial" by concluding that juries must find all the "facts of the crime the State actually seeks to punish." 542 U.S. at 306-307.

The unconstitutional reliance on judicial fact-finding in applying the terrorism enhancement is underscored in this case by the jury acquittal of the Petitioner of the RICO conspiracy charge, in which two of the predicate acts charged against him were his refusal to testify before grand juries in 1998 and in 2003. Arguably, the jury rejected the government's claim that these refusals to testify before the grand jury were intended to further the illicit goals of Hamas, otherwise the jury would have arguably found the Petitioner guilty of the RICO conspiracy by finding that the Petitioner himself committed two predicate acts in furtherance of the conspiracy.

Nonetheless, the sentencing court ignored the import of the jury's verdict, which rejected the government's claim that Petitioner's grand jury refusals were intended to further the illicit goals of Hamas, and inmposed the "terrorism enhancement," guideline. The sentencing court found that since the grand jury was investigating federal terrorism crimes, Petitioner's refusal to testify was an obstruction of an investigation of a federal crime of terrorism under Application Note 2. Pet. App. 36a.

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6. *See* D. Berman, 17 Federal Sentencing Reporter, pp. 89-96 (2004).

The district court's imposition of the "terrorism enhancement," setting the guideline sentencing range of 210-262 months, was not only inconsistent with the jury verdict, but clearly unreasonable. Although the district court reduced the sentence from the 210-263 range to 135 months, the initial guideline calculation was improper. Without the terrorism enhancement finding by the sentencing court, Petitioner's sentence would have been reversed by any reviewing court as unreasonably excessive.

B. JUSTICE SCALIA'S CONCURRING OPINIONS IN *RITA* AND *GALL* SPECIFICALLY IDENTIFIED THE UNRESOLVED PROBLEM PRESENTED BY THIS PETITION.

The constitutionality of judicial fact-finding, which allows for sentences which are unreasonably increased yet within the statutory maximum, is an important issue that this Court has yet to decide. This was the very question identified by Justice Scalia in his concurring opinion in *Rita v. United States*, 551 U.S. 338, 370-374 (2007) (Scalia, J., concurring in part and concurring in judgment). In a hypothetical posited by Justice Scalia in his concurrence in *Rita*, a defendant is convicted of robbery for which a sentence of 33-41 months would be appropriate under the guidelines, the sentencing court then finds a number of additional facts not found by the jury, including the use of a firearm, bodily injury and the amount stolen, raising the sentencing range to 235-293 months. *Id.* at 371-372. Justice Scalia then goes on to find a constitutional problem with such an increase

by judicial fact-finding based on a preponderance of the evidence:

> [T]hose judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293 month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless impose a 293 month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide), the sentence would be reversed as unreasonably excessive.

Id. at 372 (emphasis in original).

Justice Scalia's concurrence goes on to explain that a reasonableness review by an appellate court is an "improper and inadequate remedial scheme unless it ensures that judge-found facts are *never* legally necessary to justify the sentence imposed under the advisory Guidelines." *Id.* at 377 (emphasis in original). Since this issue was not directly presented in *Rita* it was not decided by the Court. In his subsequent concurring opinion in *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring), Justice Scalia reiterated his reasoning from *Rita*:

> [A]s I noted in *Rita*, the Court has not foreclosed as-applied challenges to sentence.

> The door remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.

It should be beyond question, however, that without the judge-found factual determination that a "terrorism enhancement" was appropriate, Petitioner's sentence of 135 months would never have been justified and would have been reversed as unreasonably excessive. A sentence which is not justified by the jury-found facts, but only by the judge-found facts runs afoul of the Sixth Amendment.

This argument does not contradict the principle that a judge can find facts to determine a defendant's guideline range and exercise its discretion in fashioning a fair sentence. However, when the judge's factual findings, which are essentially facts concerning an offender's conduct and not his characteristics, converts a sentence above that which can be found to be substantively reasonable based on the jury verdict, such a judicial increase violates the Sixth Amendment.

II. THE TERRORISM ENHANCEMENT GUIDELINE, WHICH MANDATES A FINDING OF AN INTENT TO PROMOTE TERRORISM BASED SOLELY ON THE SUBJECT MATTER OF THE GRAND JURY INVESTIGATION AND NOT ON THE ACTUAL INTENT OF THE GRAND JURY RESISTOR, PRESENTS AN IMPORTANT CONSTITUTIONAL CHALLENGE OF FIRST IMPRESSION.

This case presents a case of first impression concerning the constitutionality of the "terrorism enhancement" sentencing guideline as applied to a defendant who is convicted of criminal contempt for refusing to testify before a grand jury investigating federal terrorism offenses. Section 3A.4 of the sentencing guidelines provides that "if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism . . . increase to level 32," and the criminal history category shall be Category VI. Application Note 2(B) to § 3A1.4 provides that, "obstructing an investigation of a federal crime of terrorism shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism." Following these guidelines, the "terrorism enhancement" was imposed by the sentencing court based on her finding that Petitioner obstructed an investigation of a federal crime of terrorism by refusing to testify before a grand jury investigating crimes of terrorism. Pet. App. 36a.

The sentencing court's ruling ignored Petitioner's actual intent and substituted the nature of the grand jury investigation to support her finding that Petitioner

"intended" to promote the crime of terrorism. The terrorism enhancement guideline creates an improper and unconstitutional strict liability standard mandating a finding of an intent to obstruct a terrorism investigation and thus an intent promote the crime of terrorism regardless of facts showing that obstruction of a terrorism investigation was not the actual intent of a grand jury resistor.

The terrorism enhancement guideline, which mandates a finding of an intent to promote the federal crime of terrorism against a grand jury resistor without proof of the resistor's intent and which dramatically increases a grand jury resistor's sentence, offends well-established constitutional principles. This Court has repeatedly recognized that "the existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). As this Court stated in *Morissette v. United States*, 342 U.S. 246, 250-51 (1952), "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Referring to statutes that require only fines or light jail sentences, this Court has also recognized that, "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Staples v. United States*, 511 U.S. 600, 616 (1993); *Morissette*, 342 U.S. at 256.

Although here the Court is presented with a challenge to a sentencing enhancement which requires no *mens rea* and substantially increases a defendant's sentence, rather than a statute, the underlying constitutional principles are still applicable. The imposition of a sentencing enhancement - even under a now advisory regime - which potentially increases a defendant's sentence ten fold for promoting terrorism, without a requirement of an actual intent to promote terrorism, violates the bedrock principles of Anglo-American criminal jurisprudence.

Petitioner's case underscores the constitutional dangers in mandating such a determination of one's intent without a factual inquiry. In the absence of a finding - most properly made by a jury[7] - that Petitioner's refusal to testify was intended to mislead or interfere with the grand jury, the imposition of the terrorism enhancement, without any determination as to what was in fact Petitioner's *mens rea*, offends Due Process as well as the Sixth Amendment. Further, the fact that Petitioner's stated refusal was based on his political and religious beliefs and such principles are irrelevant under the terrorism enhancement guideline also runs afoul of the First Amendment.

Petitioner clearly stated to the grand jury that his purpose in refusing to testify was not to obstruct the

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7. A criminal contempt conviction for refusing to testify before a grand jury which allows a convicted defendant to be sentenced under a terrorism enhancement for intending to promote terrorism, the critical determination of a defendant's actual intent should be one for the jury. Cf., *Castillo v. United States*, 530 U.S. 120 (2000).

grand jury's investigation, but rather to avoid knowingly or unknowingly providing information that would jeopardize himself, his family or his fellow Palestinians:

> It is not my intention to obstruct justice or interfere with any matters under consideration by the grand jury. . . I can not and will not permit my answers to be used against my friends, relatives, and colleagues, who have committed no crime or wrongs but are being singled out for their involvement – involvement in the struggle for our legitimate rights as recognized under international law.

The fact that Petitioner was convicted of criminal contempt and obstruction of justice, particularly in light of the acquittal on the RICO charge, is not evidence that he "intended" to obstruct a terrorism investigation or "promote" the federal crime of terrorism. If a defendant had appeared before a grand jury and testified falsely, that could be considered evidence of an intent to obstruct a grand jury investigation, but a defendant's reasons for refusing to testify, which implicate First Amendment values and principles and a fear of foreign persecution, should have been considered by the sentencing court. The fact that the sentencing guidelines are now only advisory does not cure the sentencing court's imposition of the terrorism enhancement as a starting point in a defendant's sentencing calculation. The draconian effects of beginning a sentence determination by imposing the terrorism enhancement irreparably colors any ultimate sentence, as it did in this case.

The record established that Petitioner is a committed activist for Palestinian rights targeted by the Israeli government as are many other Palestinians. The persecution by the Israelis followed Petitioner to the United States where the Israelis caused the FBI to inquire about him while he was a graduate student at the University of Mississippi in the early 1990's.

While Petitioner readily agreed to meet with the FBI to explain to them the efforts of the Palestinian people to secure their rights and land, he made his intent clear then that he would not provide names of activists who were also working for justice for the Palestinian people. The government knew full well at the time he was subpoenaed to Chicago in 2003 that Petitioner would not collaborate with any federal grand jury investigating the Palestinian freedom movement.[8] Yet, in the face of this clear evidence that Petitioner would not cooperate with a grand jury investigation into the Palestinian movement, the government chose to again subpoena Petitioner only a few years after his refusal in New York and only a few weeks before he had withdrawn his request for political asylum and voluntarily agreed to depart the country.

Based solely on his refusal to testify and the subject of the grand jury investigation, it was not consistent with due process to presume, as mandated by the terrorism enhancement guideline, that it was Petitioner's intent to

---

8. It was made clear by his refusal to testify before a Southern District of New York grand jury investigating the funding of the Palestinian movement and his 6 month incarceration in 1998. It was after Petitioner carried out a hunger strike that the New York district court conceded that civil contempt would not coerce someone with such deeply held political beliefs to testify.

obstruct a terrorism investigation. Rather, the sentencing court should have considered the specific intent of Petitioner, particularly in light of the facts of his case, and the long history of political activists who have declined to become unwilling informants against their movements.[9]

The trial and record below also established that Petitioner was a target of the government of Israel. He was arrested in Gaza, harshly interrogated and subjected to constant surveillance. Even after he re-located to Mississippi the Israeli authorities initiated further harassments through the FBI. In his refusal to testify he made it clear to the grand jury that he had a fear of Israeli actions based on his testimony.

> Any answer I might provide, could and would, be given to Israel and would be used by Israel against me in an unfair, illegal and politically motivated prosecution for my beliefs, and associations and religion. Having been tortured by Israel for my beliefs, associations and religion any answer I might provide could be given to Israel which would again torture me as a result of such answer.[10]

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9. Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. Crim. L. & Criminology 1159 (1984). *See, generally*, Victor S. Navasky, *Naming Names*, New York: Viking Press (1980).

10. While Petitioner is aware of this Court's decision in *United States v. Balsys*, 524 U.S. 666 (1998), that the Fifth Amendment does not generally apply to foreign prosecutions, the opinion does recognize that "if it could be shown that the

(Cont'd)

Petitioner is not arguing here that the lower court's grant of immunity was insufficient to supplant his Fifth Amendment rights. Rather, Petitioner contends that his long history of political activism on behalf of the Palestinian people, and the documented efforts by the Israeli government to silence him, should have been considered by the sentencing court in determining whether or not his intent was to obstruct the grand jury investigation and thus promote the federal crime of terrorism.

The terrorism enhancement guideline, however, which mandates a finding of intent to obstruct a terrorism investigation without a finding of a defendant's *mens rea*, is unconstitutional and improperly allows a sentencing court to dramatically increase a defendant's sentence in violation of the Fifth, Sixth and First Amendments.

(Cont'd)

United States was granting immunity from domestic prosecutions for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries then an argument can be made that the Fifth Amendment should apply based on a fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly foreign." *Id.* at 698. In this case, there is no dispute that the U.S. government worked closely with the government of Israel in investigating and prosecuting the Petitioner and his co-defendant, sharing evidence, expertise and even producing Israeli security agents to testify.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 2, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-3879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABDELHALEEM HASAN ABDELRAZIQ ASHQAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CR 00978-3—**Amy J. St. Eve**, *Judge.*

ARGUED APRIL 7, 2009—DECIDED October 2, 2009

Before POSNER, RIPPLE and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* Abdelhaleem Hasan Abdelraziq Ashqar, a Palestinian, was convicted of obstruction of justice and criminal contempt after he refused to answer certain questions before a grand jury. Because the grand jury was investigating alleged terrorist acts of Hamas, the district court applied the

terrorist enhancement in U.S.S.G. § 3A1.4. As a result, Ashqar's advisory Guideline sentence range on one count jumped from 24-30 months to 210-262 months. The district court chose a point roughly in the middle of those extremes, 135 months' imprisonment.

While Ashqar challenges his conviction—arguing that the district court erred by refusing to give his proposed jury instruction defining "corruptly"—he devotes most of his brief on appeal to various challenges to his sentence. He argues that applying the terrorist enhancement violates his Sixth Amendment right to a jury trial because it increases his sentence based on judicially-found facts and on conduct for which he was acquitted. Alternatively, even if it was constitutional to apply the enhancement, he argues that the district court failed to make the necessary predicate findings: that Ashqar intended to promote a federal crime of terrorism, that the grand jury was investigating a specific terrorist act, and that this crime satisfied the definition of "federal crime of terrorism" in 18 U.S.C. § 2332b(g)(5). Finally, Ashqar contests the procedural reasonableness of his sentence by arguing that the district court neglected some of his arguments under 18 U.S.C. § 3553(a).

After a careful review of the transcripts and evidence, we find that the district court committed no errors. We therefore affirm Ashqar's conviction and sentence.

Appendix A

I

For over ten years, the Federal Bureau of Investigation has been investigating Ashqar for his role as a communication and financial conduit for the terrorist organization Hamas. That investigation included direct meetings between Ashqar and the FBI during the 1990s, wiretaps of Ashqar's telephone and fax machine, a search of Ashqar's home, and a review of Ashqar's financial records. In February 1998, a grand jury sitting in the Southern District of New York subpoenaed Ashqar to testify about his dealings with Hamas. Ashqar appeared but refused to answer questions. He was found in civil contempt and jailed, but he was released after he staged a hunger strike. The FBI's investigation into Hamas continued, and Ashqar was subpoenaed for a second time in June 2003 to appear before a grand jury sitting in the Northen District of Illinois. On June 25, 2003, Ashqar appeared before the grand jury and again refused to answer any questions about his dealings with Hamas. With few exceptions, Ashqar responded to any question posed by the Assistant U.S. Attorney ("AUSA") or the grand jury by reading a prepared statement that summarized his reasons for refusing to testify. The AUSA explained to Ashqar that the grand jury was investigating terrorist activities by Hamas, and he provided the citations for the statutes covering the crimes under investigation. He told Ashqar that his testimony was "critically important" to the grand jury's investigation and that Ashqar's refusal made the investigation "extremely difficult." Ashqar persisted in his refusal to talk, however,

even after the court granted Ashqar immunity and ordered him to testify. At this point, the AUSA warned Ashqar that the government could prosecute him for criminal contempt and obstruction of justice. For these crimes, the attorney cautioned, Ashqar could receive maximum penalties of ten years and life, respectively. Ashqar responded by rereading his prepared statement. At this point, the court found Ashqar in civil contempt and the hearing ended.

As the AUSA had warned, the government charged Ashqar with criminal contempt, in violation of 18 U.S.C. § 401(3), and obstruction of justice, in violation of 18 U.S.C. § 1503, for his refusal to testify on June 25. It also charged Ashqar with a racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), based on his two refusals to testify. At trial, Ashqar asked the district court to use his proposed jury instruction to define the term "corruptly" for purposes of § 1503, but the court instead read the Seventh Circuit Pattern Jury Instruction. On February 1, 2007, almost three months after the trial began, the jury found Ashqar guilty of obstruction and criminal contempt and acquitted him of racketeering.

The sentencing hearing lasted two days and included testimony by FBI Special Agent David Bray about the grand jury's investigation. According to Bray, the grand jury was investigating Hamas's support structure in the United States, especially the people offering financial, logistical, and communication assistance for Hamas's terrorist activities abroad. Bray named several of the people and terrorist acts under investigation, including

however, that Petitioner's argument that in determining whether a sentence runs afoul of the Sixth Amendment, the maximum sentence that should be considered reasonable is one that would be considered reasonable based solely on the facts found by the jury. "While the argument is not without its advocates, see *Rita v. United States* 338, 369-85, 127 S. Ct. 2456, 168 L. Ed 2d 203 (2007) (Scalia J., concurring), it is not the law." Pet. App. 11a.

Petitioner's case presents the stark example of the increasing use of judicial fact-finding using a preponderance of evidence standard to unreasonably increase a defendant's sentence, which is not sanctioned by the jury's verdict, in violation of the Sixth Amendment. This case presents the precise problem which this Court left undecided in *Rita v. United States*, 551 U.S. 338 (2007), which Justice Scalia recognized in his concurring opinion was a "patent inconsistency hanging in the air, threatening in the future yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust." *Id.* at 384 (Scalia, J., concurring in part and concurring in judgment).

To restrict the limitation on judicial fact-finding at sentencing only to cases in which the statutory maximum is exceeded is unfair and unwarranted in criminal contempt convictions for grand jury resistence. Since the criminal contempt statute (18 U.S.C. § 401(3)), has no maximum penalty allowing for any sentence up to life in prison, the district court can engage in unfettered judicial fact-finding that dramatically increases a defendant's sentence and yet not arguably run afoul of

of law, we will not disturb them. *United States v. Matthews*, 505 F.3d 698, 704 (7th Cir. 2007).

A person obstructs justice if she "corruptly. . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503. Ashqar asked the district court to define "corruptly" as follows:

> To act corruptly means to act knowingly and dishonestly with an improper motive or with an evil or wicked purpose with the specific intent to influence, obstruct, or impede the due administration of justice.

The court instead chose to use the Seventh Circuit Pattern Jury Instruction:

> To sustain each charge of obstruction of justice, the government must prove the following propositions:
>
> . . .
>
> Third, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.

As Ashqar acknowledges, we have already approved the instruction used by the district court. See *Matthews*, 505 F.3d at 704 (holding that with the purpose of

substantially increases a defendant's sentence for refusing to testify before a grand jury but obviates a *mens rea* requirement, presents a case of importance and of first impression.

STATEMENT OF THE CASE

Petitioner, Abdelhaleem Hasan Abdeelraziq Ashqar, has been an activist his entire adult life in the cause of Palestinian rights and the end to the occupation of his homeland. Born in 1958, Petitioner comes from three generations of Palestinians who vocally opposed the occupation of their land by foreign powers. Petitioner's grandfather was imprisoned for 6 years for his political views during the Turkish occupation of Palestine, and his father lost his farm unable to deliver his harvest because of Israeli travel restrictions and curfews imposed on the Palestinians.

In 1979, Petitioner became active at the Bir Zeit University in Ramallah in student organizations advocating for Palestinian rights. In 1981 Petitioner was arrested by the Israeli authorities during a student protest, held for 16 days without charges, and subjected to harsh interrogation. This was the first of several arrests and interrogations by Israeli authorities focused on trying unsuccessfully to force Petitioner to give information about his fellow student activists.

After obtaining his masters in business administration in Greece in 1985, Petitioner returned to occupied Palestine and was employed as a lecturer in the School of Economics and Management at the Islamic University of Gaza. The following year, Petitioner was

nexus between the corrupt state of mind and the judicial proceeding. See *United States v. Aguilar*, 515 U.S. 593, 599, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995). Instead, as *Aguilar* instructs, the court's instruction focused on the "intent to influence judicial or grand jury proceedings." *Id.* The crimes of obstruction of justice and criminal contempt each require proof of at least one different element: contempt requires proof that Ashqar disobeyed a court order, 18 U.S.C. § 401(3), while obstruction requires proof that Ashqar refused to testify with the purpose of wrongfully impeding justice. No multiplicity problem exists, and the district court's instruction fairly and accurately summarized the law. See *United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986).

B

We now consider Ashqar's challenge to his sentence. Ashqar urges us to find that the district court's computation of his advisory Guideline sentence was incorrect, because the court should not have applied the terrorism enhancement in U.S.S.G. § 3A1.4. Doing so, he asserts, violated his Sixth Amendment right to a jury trial. Putting the Sixth Amendment to one side, he also argues that the district court procedurally erred by not finding all the required facts.

Ashqar argues that applying the terrorism enhancement violated his Sixth Amendment right to a jury trial in two ways: first, because in order to do so the court relied on conduct for which the jury acquitted

Seven years later, in 1998, Petitioner was subpoenaed to testify before a grand jury in the Southern District of New York. Refusing to testify citing his political, religious beliefs, and his fear of persecution by the government of Israel, Petitioner was imprisoned in civil contempt. Stating that he would rather starve to death than become an informant against his people, Petitioner initiated a hunger strike and after 6 months the district judge who had sentenced him in contempt found that Petitioner was not going to be coerced to testify and ordered his release.

Upon his release from custody, Petitioner petitioned for political asylum stating that he had a well-founded fear of persecution by the Israeli authorities if he returned to his occupied homeland. However, upon learning that his petition for political asylum would require him to provide information about other Palestinian activists he withdrew the petition and agreed to voluntarily depart.

In June of 2003, just days before his scheduled voluntary departure, Petitioner was again subpoenaed before a grand jury sitting in the Northern District of Illinois. As he had stated before the New York grand jury, Petitioner, citing his political, personal, religious beliefs and his fear of persecution by Israel, again refused to testify and was again imprisoned for civil contempt:

> I respectfully refuse to answer any question put to me other than my name, address and occupation on several grounds. Most important, to do so would violate my long-held

jury, by acquitting Ashqar of racketeering, found that Ashqar did not intend to promote Hamas's terrorist activities.

This argument fundamentally misunderstands the meaning of an acquittal. The jury found not that Ashqar was innocent, but that a reasonable doubt existed about his guilt. Because the district court found Ashqar's intent by a preponderance of the evidence, its finding does not contradict the jury's verdict. Sentencing courts routinely rely on acquitted conduct to increase a defendant's sentence, and this reliance does not violate the Sixth Amendment right to a jury. See *United States v. Watts*, 519 U.S. 148, 154, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (holding that "a sentencing court may consider conduct of which a defendant has been acquitted"); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (holding that *Watts* survives *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)); see also 18 U.S.C. § 3661 (No limitation shall be placed on the information . . . which a court of the United States may receive and consider for purposes of imposing an appropriate sentence.").

Ashqar also argues, relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that the enhancement violated his constitutional rights because it increased his sentence based on facts not proven to a jury beyond a reasonable doubt. We have rejected variants of this argument countless times, and we do so again here. As the Supreme Court held in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856,

At sentencing, the district judge made factual findings under a preponderance standard and imposed the "terrorism enhancement" guideline, finding that the purpose of Petitioner's refusal to testify was to "promote a federal crime of terrorism," under U.S.S.G. § 3A1.4. Pet. App. 36a. Based on this determination, Petitioner's offense level was increased 18 levels to a level 32, and his criminal history to a category VI, which presented a guideline sentencing range of 210-262 months. Pet. App. 37a. Without the district court's findings, Petitioner's base offense guideline sentencing range was 15-21 months.[1]

The district court then finding that Petitioner had no prior criminal history, that there was no evidence that Petitioner "ever participated in any violent acts or intended to do so," and that there was no evidence that the "terrorist activities under investigation by the grand jury were directed at the United States," sentenced Petitioner to a prison term of 135 months.[2] Pet. App. 39a, 42a-43a.

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1. The base level for obstruction of justice under 2J1.2 is level 14. Similarly, the criminal contempt conviction, which is analogous to the obstruction in this case, *see* 2X5.1, also sets a base level of 14. The district court did find that Petitioner's refusal to testify constituted a substantial interference of the administration of justice, increasing the base offense level three points (2J1.2(b)(2)) to 17, a range of 24-30 months. Pet. App. 25a.

2. The district court determined that a category VI criminal history "significantly and substantially over represented Petitioner's criminal history." Pet. App. 39a, 42a-43a. Reducing the criminal history to a category I and maintaining an offense level of 32, the court calculated a guideline range of 121-151 months. *Id.*

maximum. The statutory maximum for obstruction is 10 years (120 months), and that is the sentence the district court chose for that count; the statutory maximum for criminal contempt is life, well above the 135 months Ashqar received on that count.

In the alternative, Ashqar argues that the district court erred procedurally because it neglected to find all the necessary facts before applying the enhancement. Ashqar identifies three allegedly missing factual findings: (1) that Ashqar intended to promote a federal crime of terrorism; (2) that the grand jury was investigating a specific crime of terrorism; and (3) that the crime was calculated to influence the actions of a government, as required under § 2332b(g)(5)(A).

The terrorism enhancement applies to obstruction of justice if "the district court finds that the purpose or intent of the defendant's substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by § 2332b(g)(5)(B)." *United States v. Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005). Ashqar argues that the district court, instead of finding this required intent, interpreted Application Note 2 as if it imposed strict liability. If Ashqar obstructed justice, and the investigation dealt with a specific crime of terrorism, then (under the interpretation Ashqar attacks) the enhancement applies without any additional findings. He contends that this contradicts the text of § 3A1.4 by eliminating the requirement that the offense must be "intended to promote" a federal crime of terrorism.

To the extent Note 2 could be read to say that a conviction for obstructing an investigation of a federal crime of terrorism "involves" a federal crime of terrorism, we can see that there might be problems. In *United States v. Parr*, 545 F.3d 491 (7th Cir. 2008), we noted that "[t]he term 'involve' as used in the guidelines is not quite so broad; it means 'to include.' . . . Thus, we have held that an offense 'involves' a federal crime of terrorism only if the crime of conviction is itself a federal crime of terrorism." *Id.* at 504 (citations omitted). Obstruction is not among the crimes listed as a possible federal crime of terrorism in the statute. See § 2332b(g)(5)(B). But the district court here did not rely on that part of Note 2, nor did it find that Ashqar's offense involved a federal crime of terrorism. It instead asked "whether or not the purpose or intent of [Ashqar's] offense of conviction . . . was intended to promote a federal crime of terrorism." This question tracks both the text of § 3A1.4 and *Arnaout*. Ashqar responds that even if the district court asked the right question, it gave an insufficient answer because it found not that Ashqar "intended to promote" a federal crime of terrorism, but that Ashqar "intended to obstruct a terrorism investigation into Hamas activities." The government counters that obstructing an investigation into a crime can be one way of promoting that crime. Thus, intent to obstruct an investigation is enough, at least where obstructing an investigation promotes the crime. We agree. Promoting a crime includes helping and encouraging that crime, and one way of furthering a crime is to try to prevent the government from finding out about it. So long as the sentencing court finds that

the defendant intended to obstruct an investigation into a federal crime of terrorism, as opposed to an investigation into more ordinary violations of the law, the court has found the intent required to apply § 3A1.4.

Ashqar also claims that the district court found neither that the grand jury was investigating a specific crime of terrorism nor that any crime under investigation met the requirement in 18 U.S.C. § 2332b(g)(5)(A). The record, however, does not support this assertion. The district court began its discussion of the terrorism enhancement by noting the definition of a federal crime of terrorism in § 2332b(g)(5), including the requirement that the crime be "calculated to influence or affect the conduct of government or to retaliate against government conduct." § 2332b(g)(5)(A). It then identified the evidence on which it relied in finding that the grand jury was investigating such a crime: Agent Bray's testimony at the sentencing hearing, the evidence at trial, and Ashqar's testimony before the grand jury. The court even quoted from the transcript and listed the specific crimes, accompanied by the statute number, that it found were under investigation. Perhaps the district court never said "and I find that these crimes were intended to influence a government" but such formality is hardly necessary. A sentencing court must "identify which enumerated federal crime of terrorism the defendant intended to promote, satisfy the elements of § 2332b(g)(5)(A), and support its conclusions by a preponderance of the evidence with facts from the record." *Arnaout*, 431 F.3d at 1002. The district court here identified the crimes

under investigation, stated the proper definition of a federal crime of terrorism, and then found that the identified crimes qualified as federal crimes of terrorism. It supported these findings with specific facts in the record, and Ashqar does not argue that these findings are clearly erroneous. This was enough.

Finally, Ashqar contends that his sentence is procedurally unreasonable because the district court failed to consider several of his arguments, including the following: Ashqar's various criticisms of Application Note 2; the historical oppression of Palestine; his fear of Israel's retribution; the impropriety of the grand jury's inquiry into events prior to Hamas's designation as a terrorist organization; and the implications of Ashqar's acquittal of the racketeering charge.

The sentencing judge should set forth enough to satisfy the appellate court that [s]he has considered the parties' arguments and has a reasoned basis for exercising [her] own legal decisionmaking authority." *Rita*, 551 U.S. at 356. Despite what Ashqar contends, *Rita* does not require the district court to state why it rejects every argument offered by the defendant. This case illustrates the reason for such a rule, as Ashqar's sentencing brief filled 175 pages. The district court diligently considered the § 3553(a) factors before sentencing Ashqar. The one factor the district court did not explicitly mention was § 3553(a)(6)—the need to avoid unwarranted sentence disparities among similar defendants. Ashqar brands this omission as unreasonable, while the government dismisses this

argument as frivolous and therefore reasonably omitted. Since Ashqar offered as comparators only [*827] defendants not subject to the terrorism enhancement, we agree with the government's characterization. The district court considered the parties' arguments and explained in detail its reasons for choosing the sentences it did. That was all it had to do.

* * *

We AFFIRM the judgment of the district court.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF SENTENCING PROCEEDINGS DATED NOVEMBER 21, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 03 CR 978-2

Chicago, Illinois
November 21, 2007
8:33 o'clock a.m.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ABDELHALEEM HASAN ABDELRAZIQ ASHQAR,

Defendant.

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE

* * *

[commencing at page 218]

THE COURT: All right. And Dr. Ashqar, other than what your lawyer has submitted to the Court in the submissions which address the guideline calculations

which I will get to in a moment, do you have any objections or corrections to the presentence investigation report?

THE DEFENDANT: No, your Honor.

THE COURT: Let's turn to the guideline calculation.

The base offense level. I have read your submissions thoroughly. Your objection, Mr. Moffitt, to the base offense level is overruled. The base offense level under 2J1.2 for obstruction of justice is a level 14.

You have — 2J1.11 governs contempt and the defendant's convictions here were on Count Four, contempt, and Count Five, obstruction.

2J1.1 cross-references 2X5.1, which provides the Court should apply the most analogous guideline where no guideline has been expressly promulgated for the offense.

Your objection was to applying the obstruction of justice base offense level here.

The application notes to the guideline make clear that in certain cases, the offense conduct will be sufficiently analogous to obstruction of justice for that guideline to apply.

The Seventh Circuit also made this clear in U.S. vs. Alwan, 279 F.3d 431 at 440, a 2002 Seventh Circuit, where it [219] specifically noted that "2J1.1 recognizes that in some cases, a defendant's conduct may justify the application of 2J1.2 for obstruction of justice. This is one of those cases."

It's clear from the evidence at trial, including the defendant's conviction on the obstruction of justice count, that Dr. Ashqar's refusal to testify before the grand jury was an effort to obstruct an ongoing criminal investigation into potential criminal activities by various individuals and organizations.

I reject your argument that his failure to appear — that failure to appear is more analogous here and should provide the base offense level because he did appear here and he refused to testify, and the jury's verdict certainly supports it.

I am adopting the probation officer's findings with respect to the base offense level, which is a 14.

I also want to add — first of all, I want to compliment Officer Rice on her thorough and detailed report before I go any further, especially for somebody who did not sit through the lengthy trial in this case. I commend you for the thorough report that you have provided —

MS. RICE: Thank you.

Appendix B

THE COURT: — to the Court and to the parties, Officer Rice.

MS. RICE: Thank you, your Honor.

[220] THE COURT: Before I go further on the guidelines, I want to address some general objections, Mr. Moffitt, that you have made to all of the guideline applications, and then I'll go back to the specific applications and specific enhancements.

You have, in your submission to the Court, repeatedly raised First Amendment issues. I have addressed your First Amendment issues at length in this case, and your submission that you've submitted to the Court is essentially more of the same that I've already addressed. I am incorporating the Court's prior rulings in both pretrial and post-trial on your First Amendment arguments, Mr. Moffitt, including the Court's November 17th, 2005, opinion which can be found at 2005 Westlaw 3095543, and the Court's ruling on your post-trial motions for acquittal and for a new trial. And I am rejecting your First Amendment arguments for the reasons I've already addressed at length. And I am incorporating those by reference.

Also, I do note, because your submission as a prior submission to this Court ignored it, that I am incorporating and referring to the Seventh Circuit's decision in 2003 affirming the Chicago district court's civil contempt order against Dr. Ashgar. The Seventh Circuit previously determined that both the New York

and the Chicago district court's contempt orders were designed to coerce Dr. Ashqar into [221] complying with the Court's orders. That is not in your submission, and I'm incorporating that by reference into the Court's sentencing today.

The Seventh Circuit's opinion is at In Re Grand Jury Proceedings of the Special April 2002 Grand Jury, 347 F.3d 197 at 200 and 206 to 207. That's a 2003 opinion.

With that, I will turn to the specific offense characteristic enhancement. You have objected to the three-point specific offense characteristic enhancement set forth in Section 2J1.2(b)(2).

I have read your submission — all of your submissions, Mr. Moffitt. I've read the government's response. In light of Agent Bray's testimony from last week, is there anything you would like to add, Mr. Moffitt, to that proposed enhancement?

MR. MOFFITT: Judge, forgive me, but the numbers don't —

THE COURT: Sure, sure.

The enhancement for substantial interference with the administration of justice. That's the three-point enhancement.

Appendix B

* * *

[238] THE COURT: Guideline 2J1.2(b)(2) provides that if the offense level resulted in substantial interference with the administration of justice, increase the offense level by three levels. Note 1 to that guideline provides that substantial interference with the administration of justice includes a premature or improper termination of a felony investigation, an indictment, verdict or any judicial determination based upon perjury, false testimony or other false evidence or the unnecessary expenditure of substantial governmental or court resources.

The Seventh Circuit has also referred to this in U.S. vs. Tankersley, T-A-N-K-E-R-S-L-E-Y, 296 F.3d 620. That's a [239] 2002 Seventh Circuit case.

The last part of that note is what the operative provision in this case is, the unnecessary expenditure of substantial governmental or court resources.

Before I get to your objection on whether or not this applies, I want to first address, Mr. Moffitt, an objection that you made to this enhancement, as well as to the others. You have objected to the application of the preponderance of the evidence standard by the Court in its fact-finding for sentencing purposes. That objection is overruled based on clear Seventh Circuit law. U.S. vs. Alwan, 279 F.3d 431 at 440, a 2002 Seventh Circuit opinion; United States vs. Emerson, 501 F.3d 804, an opinion from this year; and indeed, in August of

this year, the Seventh Circuit in U.S. vs. Hollands, 498 F.3d 622 at 633 reiterated that "judicial fact-finding by a preponderance of the evidence is still, a legitimate basis for arriving at the applicable guidelines range and does not violate the Constitution, so long as the guidelines are advisory and the ultimate sentencing decision is based on the Section 3553(a) factors."

I am — based on clear Seventh Circuit precedent, I am rejecting and overruling your constitutional arguments.

MR. MOFFITT: Your Honor, if I might, I understand what your Honor did, but I certainly wish to be heard with regard to the terrorism enhancement.

[240] THE COURT: We're not at that yet. If you want to be heard on that, I certainly can. You've made that objection as to the applicable standard throughout, including to the 2J1.2(b)(2) enhancement.

MR. MOFFITT: I understand. I just want it be clear.

THE COURT: And I'm overruling your objection.

I also find that the government has established by a preponderance of the evidence that Dr. Ashqar's refusal to testify before the grand jury resulted in a substantial expenditure of time and money by the government, and the substantial interference of administration of justice applies.

I'm basing this on several factors. The evidence that was introduced at trial established that the defendant's knowledge and connection with Hamas leaders through phone calls, through documents that were obtained at his residence, including the list of individuals that was submitted at the beginning of this sentencing hearing last week. Agent Bray's credible testimony established that the government had to have investigators organize and analyze voluminous financial records to determine relationships and connections among Hamas co-conspirators, as well as the origin and final destination of significant monetary sums.

Dr. Ashgar, based on the evidence obtained in his residence and other documents admitted at trial, was in a unique position to provide information regarding other Hamas [241] members in the United States. The Jarad debriefing memo that was written by Dr. Ashqar, which was admitted as an exhibit in trial, is one piece of evidence of that.

Agent Bray also testified about the significant resources that had to be expended by the FBI to address the financial documents, as well as the communication among individuals that they were focusing on in connection with their investigation. Agent Bray described this as a series of needles in a haystack that they were trying to decipher and that Dr. Ashqar's testimony could have provided relevant information to them and could have helped them find those needles in the haystacks.

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His testimony, as well as the evidence admitted at trial, more than satisfies the government's preponderance of the evidence standard that significant resources on financial documents and other documents found in his residence had to be committed, hundreds if not thousands of hours he testified to, had to be committed to decipher this information that could have been deciphered by Dr. Ashqar.

In addition, something that came out during trial, there were various confessions found from Hamas individuals in Dr. Ashqar's residence that he was collecting and sending to others as we heard at trial, including his co-conspirators or charged co-conspirator, Mr. Salah's confession that was discussed at length in trial and I'm not going to go into [242] here. But that information, as Agent Bray testified to, was very relevant to their information. Why he had that, who these individuals were, where was he obtaining that information. All of that is information that just supports the substantial interference with the administration of justice in this case.

I am overruling your objection to that three-point enhancement, Mr. Moffitt, and I will adopt the presentence investigation's calculation and apply the three-level enhancement under 2J1.2(b)(2).

You made a point, Mr. Moffitt, that the government would have translated all of these phone calls anyway. It's a lot easier to translate phone calls when you have one of the participants in the phone conversation helping

you translate them. And Dr. Ashqar did not provide that assistance.

For those reasons, I am applying the three-level enhancement.

The next objection in the presentence investigation report's calculation is to the application of the cross-reference 2J1.2(c), the cross-reference applying 2X3.1.

2J1.2(c) provides that if the offense involved obstructing the investigation or prosecution of a criminal offense, apply 2X3.1, the accessory after the fact in respect to that criminal offense if the resulting offense is greater than that determined above.

[243] The presentence investigation report applies the offense level for murder pursuant to 2A1.2 — 2A1.1. I am sustaining your objection to the application of this enhancement. The government did not originally seek this enhancement. This was something that was in the presentence investigation report.

Based on all of the evidence that this Court heard through the lengthy trial, in addition to Agent Bray's testimony, this — the application of this enhancement is too tangential to this case. Even Agent Bray, when he was asked about specific murders, he answered, well, the answer to that is yes and no, which I think was telling about connecting the offense of conviction here to murders. There is no specific evidence that has tied Dr. Ashqar to any particular murders. I think that

application is just too tangential, and I will sustain your objection.

Mr. Schar, if you want to put anything on the record, you're certainly welcome to do so. I know you addressed it in your written submission, but if you feel the need to add anything for purposes of the record, go ahead.

MR. SCHAR: Judge, for purposes of the record, no. We believe the PSR is accurate. However, we will stand on the brief in that regard.

THE COURT: Okay.

* * *

[257] THE COURT: I am going to address in my ruling regarding this enhancement all of the issues, not just the ones you've raised today, but the ones you have raised in your papers, as well. So, my ruling on this is going to be lengthy because of all of the issues you have raised.

I will start with — first of all, the enhancement is Section 3A1.4 that provides if the offense is a felony that involved or was intended to promote a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to a level 32.

I will start with your argument that the jury verdict dictates this issue. I am rejecting that argument on several bases.

First of all, the jury was considering a separate [258] issue, whether or not Dr. Ashqar had committed a RICO conspiracy or should be guilty of a RICO conspiracy. Seventh Circuit law is very clear that courts can't guess why juries reached certain verdicts.

But this is a separate issue. The question is whether or not his refusal to testify before the grand jury obstructed a federal crime of terrorism, which would be an underlying terrorism investigation as set forth in the application note that you pointed out to the Court previously.

Even if, Mr. Moffitt, your argument were correct, that somehow it was the precise issue, again, the Seventh Circuit — which I don't think it is, but the Seventh Circuit has been very clear that even acquitted conduct can be the basis for sentencing enhancements. But I don't rely on that because it is a separate issue from what the jury determined.

I'm also rejecting your argument that Apprendi dictates this. Apprendi is not applicable here because the statutory maximum, as Mr. Schar pointed out, is ten years for obstruction of justice and life for contempt. So, there is not an Apprendi issue.

In addition, in United States vs. Hale, 448 F.3d 971 at 988, the Seventh Circuit in 2006 reaffirmed what it had held in United States vs. Arnaout at 431 F.3d 994, 1001, a 2005 Seventh Circuit case. Specifically, it held that "A defendant need not be convicted of a federal

crime of [259] terrorism as defined by Section 2332b(G)(5)(B) for the district court to apply section 3A1.4. Instead, the terrorism enhancement is applicable where a defendant is convicted of a federal crime of terrorism as defined by Section 2332b(G)(5)(B) or where the district court finds that the purpose or the intent of the defendant's substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by Section 2332b(G)(5)(B)."

The word "promote" as used in Section 3A1.4 signifies that where a defendant's offense or relevant conduct helps or encourages a federal crime of terrorism as defined in that same section, then Section 3A1.4 is triggered.

Another argument you raised in your papers, again, the beyond a reasonable doubt vs. clear and convincing versus preponderance of the evidence standard, again, Arnaout and Hale, the Seventh Circuit made clear that preponderance of the evidence standard applies to the terrorism enhancement as well.

You relied on U.S. vs. Kikumura, K-I-K-U-M-U-R-A, 918 F.2d 1084 at 1100, 1101, a Third Circuit case from 1990 in the arguments that you submitted to the Court. I am — first of all, this Court is not bound by that, nor am I persuaded by the reasoning in that.

I also note that the Seventh Circuit rejected that precise reasoning in U.S. vs. Reuter, R-E-U-T-E-R, 463

F.3d [260] 791, a 2006 Seventh Circuit opinion. We are in the Seventh Circuit. I am bound by Seventh Circuit law.

And significantly, on September 10th of this year, the Third Circuit specifically overruled its ruling in Kikumura in U.S. vs. Fisher. The Westlaw cite is 2007 Westlaw 2580632. The Third Circuit held, "This case presents the question we left open in our en banc decision in U.S. vs. Greer. Does U.S. vs. Kikumura remain good law in light of the Supreme Court's landmark decision in U.S. vs. Booker? We hold that it does not."

Therefore, any reliance on Kikumura certainly in this circuit and even in the seventh — in the Third Circuit would fail.

I am also rejecting your argument regarding acquitted conduct for the reasons I've already addressed. The Seventh Circuit itself has specifically rejected that argument. It has held, "Conduct underlying an acquitted charge may be included as long as that conduct is proved by preponderance of the evidence." I am citing U.S. vs. Rith, R-I-T-H, 461 F.3d 914 at 917, a 2006 Seventh Circuit case.

You can also look at U.S. vs. Horne, H-O-R-N-E, 474 F.3d 1004 at 1006, 07. U.S. vs. Hurn, 496 F.3d 784, another Seventh Circuit case.

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Your First Amendment argument that you make regarding the application of this enhancement, I am also rejecting that [261] for the reasons I've previously given and have given throughout the proceedings in this case as I mentioned at the beginning of today's hearing.

Here it is true, Mr. Moffitt, that Dr. Ashqar was acquitted of the RICO conspiracy, but that does not answer the question for the reasons I've already addressed. I have to look to determine whether or not the purpose or intent of the defendant's offense of conviction; namely, the obstruction of justice by failing to testify before a criminal grand jury investigating the terrorist activities of Hamas and the contempt conviction, was intended to promote a federal crime of terrorism.

In making the Court's ruling, I start with the definition of a federal crime of terrorism as the Seventh Circuit has said that I must. That is defined in the statute I previously gave you, Section 2332b(G)(5)(B) under Title 18. A federal crime of terrorism is defined as a listed offense that was calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct. And there are various things enumerated in 18, United States Code, Section 1114.

I agree with Officer Rice's conclusion that the enhancement applies here; namely, the obstruction of justice of a federal grand jury investigating the terrorist activities of Hamas.

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[262] Application 2 which you have pointed out to the Court already to Section 3A1.4, this is in both the 2006 and the 2007 guideline, it's the same, provides that an offense that involved obstructing an investigation of a federal crime of terrorism shall be considered to have involved or to have been intended to promote that federal crime.

Here, again, the offense of conviction was for obstructing justice by refusing to testify even though his testimony was compelled before a grand jury that was investigating terrorist activities.

If you look at the Court's finding, the government has met its burden of establishing this by a preponderance of the evidence. Looking at the evidence, we have first of all Agent Bray's testimony regarding what the grand jury was investigating, and Mr. Chanenson, who testified during trial, also testified about what the grand jury was investigating.

The best evidence, frankly, is the testimony and the transcript from Dr. Ashqar's testimony on June 25th, 2003, before the grand jury. This was admitted into evidence at the trial.

The transcript makes clear that the prosecutor explained to Dr. Ashqar before the grand jury that he was appearing before a grand jury that was investigating federal crimes of terrorism, including certain acts committed by Hamas.

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[263] Looking at Pages 8 through 11 of the transcript, it is, again, very clear — I'm going to quote from this, this is the prosecutor speaking: "Let me just explain to you that this grand jury — I will tell you this grand jury is engaged in a broad investigation involving federal crimes of terrorism, including certain acts committed by Hamas. I would like to explain to you some of the laws that the grand jury is investigating. These are federal criminal laws that the grand jury is investigating. If you don't understand at any time the laws I'm talking about or you would like further explanation, feel free to interrupt me because I'm going to go through a list of laws that the grand jury is investigating."

The prosecutor then went through a list of laws, including conspiracy to kill, kidnap or maim under 18, United States Code, Section 956; 18, United States Code, Section 1203 regarding hostage taking; Section 2332, which makes it a crime to kill a United States national while the national is outside of the United States; Section 2339(a), which makes it a crime to provide material support and resources to terrorists; Section 2339(b), which makes it a crime to provide material support and resources to a terrorist organization, including Hamas; Section 2339(c), which makes it a crime to finance terrorists and terrorist organizations; Section 371, which makes it a crime for people to conspire to break any of the laws of the United States; Sections 1961 and 1962, which make [264] it a crime for individuals to participate in the affairs of an enterprise through a pattern of racketeering activity

or to conspire to participate in affairs of an enterprise through a pattern of racketeering activity; the money laundering statutes are cited, false statements to government officials, those are cited, and the mail and wire fraud are cited, as well as Section 1503, corruptly obstructing the due administration of justice, including a grand jury investigation, and Section 1512, another obstruction.

Those were made very clear to Dr. Ashqar when he appeared before the grand jury and refused to testify. In addressing one of your objections in your written submission to the Court, Mr. Moffitt, not only were these made clear to Dr. Ashqar when he first appeared in the grand jury, but they were made clear to him at Pages 34 through 37 after he was immunized and compelled to testify by the chief judge telling him that what he said would not be used against him.

Dr. Ashqar refused to answer questions directly relevant to this investigation, and I am making this ruling in part based on the evidence that I heard during trial, including the documents that were admitted, the phone documents, the confessions from members of Hamas, the Jarad memo. He refused to answer every substantive question that was put before him.

And when he refused to answer, he repeatedly said, "I [265] cannot and will not permit my answers to be used against my relatives and colleagues who have committed no crimes or wrongs but who are being singled out for their involvement in the struggle for

political legitimate rights as recognized under international law. I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequence to me."

When asked if he would continue to refuse to answer questions regarding the government's terrorism investigation, despite the fact that his refusal to answer those questions would harm the investigation, he read the prepared statement again and informed the grand jury, "I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequence is to me."

When asked a series of questions about specific individuals that the grand jury was interested in, Dr. Ashqar again incorporated his statement and refused to answer saying, "I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequence is to me."

When informed by the prosecutor that his refusal to answer questions because he didn't want to give information that could be used against others made it "extremely difficult" for the grand jury to complete its investigation and to properly investigate Hamas terrorist activities, [266] Dr. Ashqar, again, refused to testify, read his prepared statement and told the grand jury, "I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequence is to me."

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After being immunized and compelled to testify by then Chief Judge Kocoras, he still refused to answer any questions regarding the investigation, regarding any terrorist activities, regarding any terrorist activities of Hamas. He was informed, again, after he was compelled to testify, that the United States thought the information he had was "critically important to the grand jury's investigation into Hamas and other terrorist activities" at Page 53 of the grand jury transcript.

He was also advised that his refusal to answer the questions would have a significant impact on the government's investigation into terrorist activities. At that point, Dr. Ashqar again refused to testify and said, "I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequence is to me."

The government has met its burden of proving, by a preponderance of the evidence at a minimum, that Dr. Ashqar intended to obstruct a terrorism investigation into Hamas activities.

I know you have cited several Virginia cases regarding what standard should apply. Those aren't binding on [267] this Court, and I frankly don't need to address that issue because I have found, based on Agent Bray's testimony, based on the evidence heard during trial, and based on the transcript, parts of which I have just reviewed with you, that there was actual obstruction here.

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I am rejecting and overruling your arguments, Mr. Moffitt, that application note 2 is unconstitutional. I've already addressed the First Amendment argument. I am rejecting your double jeopardy argument based on U.S. vs. Hall, 109 F.3d 1227, a 1995 Seventh Circuit case. And your Eighth Amendment cruel and unusual punishment argument is also inapplicable here, especially in light of the fact that the guidelines are advisory and the Court looks to the Section 3553 factors to make its final sentencing determination.

For those reasons, I am overruling your objection to the application of the terrorism enhancement under 3A1.4 of the guidelines. Based on that, the offense level increases to a level 32 with a Criminal History Category of VI.

There is no role in the offense enhancement in this case, given that Dr. Ashqar was the sole participant in the obstruction.

For those reasons, our final guideline calculation is an offense level of 32, a Criminal History Category of VI, with a corresponding guideline range of 210 to 262 months.

With respect to sentencing, Mr. Moffitt, I will hear [268] from you. And I will certainly consider some of the arguments that you have already raised with this Court that I believe are more applicable to the ultimate sentence and the Section 3553 factors than to some of the particular enhancements.

MR. MOFFITT: Let me start by saying this is not a case that I would suggest to you is contemplated by our criminal law. Dr. Ashqar is not a citizen of the United States.

THE COURT: Are you saying, just so I'm clear, that the conviction or that the level of guidelines?

MR. MOFFITT: Well, I'm talking about the entire case at this particular point. I'm assuming that you want me to make my 3553 —

THE COURT: I want to you make any arguments you have regarding sentencing and certainly include 3553 in there.

* * *

[339] THE COURT: The sentencing guidelines, as the Court has already addressed, there's a range of 210 to 262 months. The guidelines are advisory. In fashioning the sentence in this case, as the Court is directed to do so by the Supreme Court and the Seventh Circuit, the Court looks to Section 3553 [340] and the factors in Section 3553.

The sentence that the Court is going to impose is based upon those factors and will satisfy and address the factors in Section 3553. The first factor the Court must look at under 3553(a)(1), the nature and circumstances of the offense and the history and characteristics of the defendant.

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Refusing to testify before the grand jury after you have been immunized and compelled to do so is a serious offense. The grand jury process in this country is essential to obtain information for law enforcement and for our country.

I strongly disagree with your statement, Mr. Moffitt, that Dr. Ashqar had no duty to the United States. When living in this country, you have a duty and an obligation to follow the laws and comply with the laws or suffer the consequences.

Part of the honor and dignity in living in this country is abiding by those laws and complying with those laws. Refusing to comply with the court order and failing to testify before the grand jury is a very serious offense.

In looking at the nature and circumstances of the offense, I note, however, that there is no evidence that you, yourself, Dr. Ashqar, have ever participated in any violent acts or intended to do so. There also has not been any evidence in this case that the terrorist activities that were under investigation by the grand jury were directed at the United States.

[341] In looking at your history and characteristics, Dr. Ashqar — and I have reviewed all of the letters, Mr. Moffitt, that you have provided to the Court, but I'm also looking at the evidence that has been provided to this Court during the course of the trial and through the sentencing hearing and through Dr. Ashqar's own statements today. I respect that you want to support

your family members, Dr. Ashqar, but when you're in this country, you must do it legally, and refusing to testify before the grand jury when you've been immunized and compelled to do so is not doing it legally.

And you, yourself, told the grand jury, "I will never give evidence or cooperate in any way with the grand jury or any other, no matter what the consequences to me," and there are consequences.

I reiterate what I said before, though. There is no evidence that you have participated in any violent acts. You do not have a criminal history. You have not been convicted other than in this action of any crimes before coming here. So, I take all of that into consideration.

One other thing I do note in looking at your history and characteristics, although you indicated that you are accepting responsibility for your actions, in the hour-and-a-half plus that you have spoken, I have not seen any remorse from you for the crime that you committed here.

[342] I also heard from you exactly the opposite, that if you were in the same situation again, that you would do the exact same thing and refuse to testify before the grand jury.

The sentence that the Court is going to impose will reflect the seriousness of the offense of conviction here, the obstruction of justice and the contempt. It will promote respect for the law.

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Mr. Moffitt, you argued that a lengthy sentence would be contrary to the principles of liberty and justice that this country was founded upon. The exact opposite is true. The ability of the government to prosecute cases depends upon truthful testimony before the grand jury. It is not up to any one individual to decide if they agree with the grand jury, disagree with the grand jury, if they can protect people.

When a witness has been immunized and compelled to testify before a grand jury, he cannot deliberately ignore that order and interfere with the law enforcement process without consequences. And that is certainly true where a grand jury is investigating terrorist activities.

Those actions undermine a critical part of our investigatory process and our prosecutorial process in the United States. In providing — the sentence the Court is going to impose will provide just punishment for the offense. It will also provide adequate deterrence to criminal conduct of others. It is essential to send a message that you cannot [343] walk into grand juries when you've been immunized and compelled to do so and say I'm going to take things into my own hands, and I'm not going to do that. You cannot do that without significant consequences.

In terms of protecting the public from further crimes of you, you refused to testify in New York. You refused to testify in Chicago. You have disregarded your legal obligations of living in this country.

Having said that, I'm not sure that any sentence the Court would impose would ever deter you from refusing to testify again. I just don't think you would ever do that, Dr. Ashqar, based upon on your own statements today and everything that the Court has seen.

The final factor in Section 3553 is to provide the defendant with needed educational or vocational training. I don't really think that is a factor here.

There is a criminal offense level of 32 and a Criminal History Category of VI, as the Court has previously said. For alternate reasons, looking at Category VI and guideline 4A1.3(b)(1), I do think that substantially over-represents the seriousness of your criminal history in this case. You have no convictions other than the one before this Court. You have not been arrested. A Category VI significantly and substantially over-represents that.

Based upon everything that the Court has seen, I [344] think a Category I is more appropriate, and my sentence will reflect a guideline offense level of 32 with a Criminal History Category of I, which has a 121-to-151-month guideline range.

For all of the factors in Section 3553, that I have just given, even if the Court should not have a Criminal History Category of I, even if the category of VI is more appropriate, under the Section 3553 factors, I would deviate from the Category VI guideline range to the guideline range that I have just noted.

For all of those reasons, pursuant to the Sentencing Reform Act of 1984, Dr. Ashqar, it is the judgment of the Court that you are hereby committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 135 months on Counts Four and Five of the second superseding indictment.

You must pay a $100 special assessment on each count of conviction for a total of $200. I am also imposing a fine of $5,000.

Upon your release from imprisonment, you shall be placed on supervised release for a term of two years on each count to run concurrent.

Within 72 hours of your release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you are released.

[345] While on supervision, you shall not commit another federal, state or local crime. You shall comply with the standard conditions that have been adopted by this Court and also comply with the following additional conditions:

You shall not possess a firearm or a destructive device.

You shall refrain from any unlawful use of a controlled substance.

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You shall submit to one drug test within 15 days of your release from imprisonment and random drug tests thereafter not to exceed 104 tests per year, as conducted and directed by the U.S. Probation Office.

You shall cooperate in the collection of a DNA sample to the extent one is authorized by the law.

In addition, you shall comply with the following special conditions:

Upon completion of your imprisonment, you are to surrender to a duly authorized official of the Homeland Security Department for a determination on the issue of your deportability by the appropriate authority in accordance with the laws under the Immigration and Nationality Act and the established implementing regulations.

If ordered deported, Dr. Ashqar, you shall not re-enter the United States without obtaining in advance the express written consent of the Attorney General or the [346] Secretary of the Department of Homeland Security.

I am going to waive the costs of incarceration and supervision based on your limited ability to pay.

You have the right to appeal your conviction in this case, Dr. Ashqar, as well as the sentence that has been imposed by the Court. If you wish to do so, you must file a notice of appeal with the Seventh Circuit within ten

days, and you can talk to Mr. Moffitt about how to go about doing that.

Is there anything further?

MR. SCHAR: Several things, Judge. On Counts Four and Five, the statutory max on Count Four is 120 months. I'm not sure if Count five is 135 or simply additional time to run consecutive.

THE COURT: Thank you for clarifying that. Count Four is the contempt which does have the statutory maximum. I will —

MR. SCHAR: The obstruction has that.

THE COURT: I'm sorry?

MR. SCHAR: The obstruction has the statutory.

THE COURT: Has the statutory maximum, which is Count — Count — because of the — it was Three and Four at the time it went to trial. Under the second superseding indictment, its Four and Five. Five is the obstruction with the 120 months.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 28, 2009

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 28, 2009

Before

RICHARD A. POSNER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 07-3879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABDELHALEEM HASAN ABDELRAZIQ ASHQAR,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 cr 00978 3

Amy J. St. Eve, *Judge.*

Appendix C

ORDER

Appellant filed his Petition for Panel Rehearing and Petition for Rehearing En Banc on October 13, 2009. No judge asked for a vote on the petition for rehearing *en banc*, and all members of the panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.